be conceded. The court's statement is as follows: "To allow the seller to recover the full purchase price of an article, and compel the buyer to accept it whether he wants it or not, is to grant specific performance of a contract for the sale of personal property in faver of the seller, when no such relief could or would be granted in favor of the buyer. This is against the well-established doctrines of courts of equity. * * * When the article is really a special manufacture to meet the peculiar needs of the buyer, and having no sale in the market, then every consideration which supports the specific performance of a contract for the sale of real property is present." "Whether the article is staple or not cannot be determined wholly by the form of the contract," and the court should receive evidence as to whether or not it has a probable market value. J. B. W.

THE NEED FOR RE-DEFINING "FREEDOM."—Again a statute attempting to limit the hours of labor has been held unconstitutional as depriving the parties to the labor contract of liberty and property without due process. This time the question arose in Massachusetts in reference to a statute that limited the hours of station employees of railways to nine hours a day. *Commonwealth* v. *Boston & M. R. R.*, 110 N. E. 264. The decision and reasoning of the court was based entirely upon the famous case of *Lochner* v. *New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133. The reasoning of that case was declared to be "decisive." The court here implied, just as was implied in the *Lochner* case, that considerations for the health of the employees were the only reasons that could bring the statute beyond the condemnation of the Fourteenth Amendment; and since it was admitted that the employment in question was not "inherently unhealthy," the case of the state necessarily failed. The reasoning of the court seems to suggest that the courts are unwilling to justify labor legislation of this sort upon any other ground than was assumed in the case of *Holden* v. *Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, namely, that the health of the laborer needs to be protected.

That the police power of the state is far more comprehensive than this would seem to be too clear for doubt. It is not impossible that the legislature may have thought a shorter working day would indirectly contribute to the enlightenment of the masses, to the increase of their efficiency, to their moral and mental development, to their enterprise or mechanical ingenuity. All of these ends and more are emphasized in a great mass of current literature and are no doubt accepted by no small part of our people as results to be gained by this sort of legislation. And it would be difficult to say that a legislature could not enact laws to accomplish those ends. It is extremely doubtful whether the average person would say that the law in question is so clearly without relation to public welfare, that there could be no "honest difference of opinion" as to its unconstitutionality.

But that the case is supported by the *Lochner* case and by a number of other cases, which are there cited in the margin, is beyond doubt. There is also a large mass of cases, touching legislation somewhat akin, which are

based upon the same reasoning and principle and which reach the same result. Important among these are *In re Opinion of the Justices,* 220 Mass. 627, 108 N. E. 807, a statute giving employees a right to be heard before discharge; *Adair* v. *United States,* 208 U. S. 161, 52 L. Ed. 436, passing upon a statute that made it unlawful to discharge an employee because of membership in a labor union; *Coppage* v. *Kansas,* 236 U. S. 1, 35 Sup. Ct. 240, involving a statute making it a misdemeanor to require non-membership in a union as a condition to employment; *State* v. *Loomis,* 115 Mo. 307, where the court considered a statute which required miners and manufacturers to pay their labor in money or orders redeemable in cash; and in the same general class of these cases see, *Atchison, etc., Ry.* v. *Brown,* 80 Kan. 312, 102 Pac. 459; *Gillespie* v. *People,* 188 Ill. 176; *Braceville Coal Co.* v. *People,* 147 Ill. 66; *Commonwealth* v. *Perry,* 155 Mass. 117.

The dominant note of these cases is the freedom of the employer and employee to contract with reference to the terms of the employment. As was said in the *Lochner* case, "The act is * * * an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual." It is a repetition of the doctrine expressed, in another connection, by JESSEL, M. R. in the last century, "If there is one thing more than another that the policy of the law requires, it is that men of full age and competent understanding be allowed the utmost freedom of contract." Upon grounds such as those the courts have very generally condemned a great amount of labor legislation.

That the freedom of contract is a valuable right, one protected by the constitution, is of course not open to doubt. And it has at least not been disproved that freedom of contract, if properly defined, is eminently sound as a general social and political principle. On those points there is no occasion for dispute. But to admit that principle is by no means to reach the conclusion which is reached in the cases referred to. Between the principle itself and the facts to which it is applied is the difficulty of reducing the principle from a mere dry formula into the terms of a living industrial organization. Freedom under one set of conditions and at one time may mean another thing than freedom under a different set of conditions and at a different time. While the general principle of freedom may be admitted, the actual realization of it is dependent upon, and cannot be separated from, all the circumstances under which it is sought to be attained. Freedom is not a thing apart, but is organically bound up with the workings and organization of society. Thus a law at one time may secure perfect freedom to the individual, and the same law at another time may amount to a denial of freedom, or conversely a law which to one may deny freedom of contract may to another, differently situated, be the means of securing the same freedom. The idea of freedom of contract is at best a mere legal concept whose

meaning and import must always be defined by the social conditions in which it is to operate.

Let us suppose a law is passed by the legislature attempting to fix the price at which a vendor may sell his horse. We must assume, if the conditions be usual, that the vendor is perfectly capable of protecting his rights, and that the purchaser is equally capable. Under such conditions the law supposed would clearly be a deprivation of the freedom of contract. But if we could suppose that because of his condition in life every vendee or most vendees would be at a disadvantage in knowledge respecting horses, then the law would perhaps have some justification. Or take the still clearer cases of infancy and insanity, where the common law itself denies freedom of contract, because to persons in that situation freedom means another thing than it does to those mature and sane. Wherever a statute or rule of law involves the freedom of contract, that concept must be understood by referring it to the circumstances of the persons upon whom it is to operate. No formal acceptation of the term will suffice, nor one which had reference to a different condition of affairs.

It may be admitted that at one time a law limiting the hours of labor would be an infringement upon individual liberty and freedom. At the time when individualistic doctrines were beginning to gain great currency, industry was local and individual; as a general rule the same persons owned the instruments of production and performed the labor. There was no such separation of capital and labor as we find in modern industry. So far as persons engaged in manufacture they were their own masters, and any attempt to limit the hours during which they should work would be an invasion of the freedom of the individual. As applied to those conditions the concept of freedom would no doubt preclude a law such as the one in question: it would in most cases be a purely arbitrary interference. That definition of freedom, hammered into shape by the stress of those social conditions, seems still to be the accepted one by the courts. This definition had its birth under circumstances which no longer exist, and it assumes a state of society which can now be found only in the theoretical reasonings of the followers of orthodox eighteenth century economics. The social analysis of Adam SMITH and John Stuart MILL is still recognized by far too many courts.

The idea of freedom of contract, as developed in the eighteenth century and the early part of the nineteenth, could take no account of the changes wrought by the industrial revolution—the introduction of machinery, the separation of capital and labor, large-scale production, the world-market. These created the entirely new relation of employer and employee as we know it to-day; there developed on the one side great strength and on the other side comparative weakness in dictating the terms of the labor contract. The individual laborer of to-day seeking employment finds the terms of the labor contract determined by great industrial forces with which he has little connection and upon which he exercises no influence at all. The market fixes the wages for him, and to some extent for the employer; the same great force determines how long he shall work in a day and to a certain

degree the conditions under which he shall perform his labor. To say that he shall have the power of bargaining freely with respect to those matters is mockery. Modern industrial organization has him inexorably in its bonds, and fixes his contract for him very largely regardless of his will. To leave him without the protection of law is in effect to deny him the very freedom which the constitution seeks to guarantee. If this view of the situation is correct, the legislation dealing with the labor problem, rather than denying freedom of contract, is an aid to its attainment. Such enactments to some degree relieve the laborer of the pressure of a vast economic superstructure. It is certainly a serious question whether the legislature cannot seek that end without violating the constitution.

Of course it may be admitted that the analysis of industrial conditions which we have just attempted may not be true at all times and places in this country. There is certainly room for difference of opinion as to the true situation and disadvantage of the laborer. But while it may be true that all laborers are not always at such a great disadvantage in bargaining for favorable terms in the labor contract, yet we believe that it would be impossible to go to the other extreme and say there is absolutely no ground for such a view of his disadvantage. There is undoubtedly some ground for saying that under modern conditions the laborer must take what he gets, and that his freedom to contract avails him nothing, and often even works to his harm. A significant fact is that much of the labor legislation is procured in the legislature through the efforts of labor organizations, and that most often it is defeated on objection made by employers. The latter would seem to be more concerned about the laborer's liberty than the laborer himself.

But whatever we may believe about conditions being or not being exactly as described, there can be little doubt that they are not as primitively simple as the courts assume. The day is past, if it ever existed, when the laborer can meet his employer and "bargain freely" over the terms of the labor contract. If that is true, the problem has a new face. The courts must now consider this question: Is it not competent for the legislature to secure to labor some of the benefits which labor would secure for itself if it enjoyed a real freedom of contract, but which it cannot really secure because, in the opinion of the legislature (and this opinion we have seen is not without foundation), present industrial conditions have deprived it of its freedom?

In dealing with legislation of this sort the courts can make far less use of precedent than in ordinary cases. Freedom in its concrete manifestation is a variable term, and each application must be tested with reference to the then existing conditions. Cases of this sort are preëminently of the kind where the courts must at all times be astute to prevent the principle of law from becoming formal, and they must always test it and shape its meaning and application by reference to the varying needs of society. As matters now stand it seems that the courts have adhered too closely to precedent and have failed to reshape their concepts in the light of new conditions. Our idea of freedom needs to be redefined in the terms of a new industrialism.

W. W. S.